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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. ...533.

EURA MAE HIGGINBOTHAM GREEN, ET AL,
Petitioners,

v.

THE TEXAS GULF SULPHUR COMPANY, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 9, 1968.

OPINIONS BELOW

The opinion of the District Court, entered the 21st of November, 1966, is unreported, but appears at page 1 of the Appendix hereto.

The opinion of the Court of Appeals for the Fifth Circuit dated April 9, 1968, is published at 393 F. 2d 67, and appears at page 18 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered April 9, 1968 (Appendix, page 16). A petition to rehear was denied by order entered June 19, 1968 (Appendix, page 20). The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I.

Where plaintiff sues asking for a declaration of rights as between the plaintiff, the defendant State of Texas, and other defendants, is it a denial of due process for the Court to refuse to decide the rights between the plaintiff and the State of Texas, and grant a summary judgment as to all of the other defendants on the ground of non-claim and the statute of limitations when (1) the doctrines of non-claim and limitations of actions do not apply when title is in the State and (2) the facts of non-claim and limitations are vigorously disputed?

II.

Can a sovereign state deprive a landholder of his interest by means of a purported tax foreclosure sale, and then deny the former landholder an adjudication of the validity of the tax foreclosure sale by claiming sovereign immunity?

STATEMENT OF THE CASE

This suit was filed on June 26, 1964 asking the Court to quiet title to the minerals in a certain parcel of land called the "Humphries League", and specifically asking that the Court cancel, annul and vacate a certain Assessor and Collector's Tax Deed to said parcel of land, this deed being dated December 27, 1850. On October 12, 1964 a motion to dismiss the Commissioner of the General Land Office of the State of Texas (a necessary party to the cancellation of the Tax Deed) was filed. On October 28, 1965, and thereafter, motions for summary judgments were filed by the other parties, supported by affidavits and certain ex parte depositions, the validity of which depositions was questioned by motion to strike and is now questioned before this Court in a Petition for Certiorari filed on July 6, 1968 (No. 272, October Term 1968). The affidavits which contended adverse possession were disputed by two court decisions and an affidavit alleging continuous litigation.

The District Court wrote an opinion disregarding the Tax Deed of 1850 and placing title in the predecessors of the defendants other than the State of Texas by a deed supposedly executed on February 14, 1836, and recorded in 1860, ten years after the Tax Deed. The District Court also disregarded an 1885 decision of the District Court of Jefferson County, Texas, which decision clearly removed title from the defendants' predecessors in interest.

The District Court then found that *it was undisputed* that from 1884 down to 1964 the defendants other than the State of Texas held the land in dispute under deeds duly registered, and thus established full and perfect title.

No mention was made of the patent to a portion of the land in dispute to James Ingalls, on April 1, 1863, or of

the patent to another portion issued to John Douthit on April 23, 1867.

The District Court entered Judgment for the defendants on December 5, 1966, and held that "It is further ordered, adjudged and decreed that Jerry Sadler, the Commissioner of the General Land Office of the State of Texas, is dismissed as a defendant from this Cause."

REASONS FOR GRANTING THE WRIT

I.

This suit was dismissed on motion for summary judgment, based upon either a non-claim theory or a statute of limitations theory barring all rights of the plaintiffs to a determination of any interest they might have in the Humphries League. Neither of these theories is applicable to a case where title is in the sovereign State, as is true in the present suit. The "non-claim" statute, T.C.S. 5519(a) reads: "In all suits involving the title to land *not claimed by the State*, if it be shown that those holding the apparent record title thereto --- etc." (See quote at 393 F. 2d 74, emphasis added.) In the case of *Houston Oil Co. of Texas v. Gore*, (1913, Texas Civil Appeals) 159 S.W. 924, the Court stated on page 927:

> "It is settled law that as limitations does not run against the state, and as all land titles emanate from the sovereignty, limitation did not begin to run in appellee's favor until the sovereignty had parted with either the legal title by patent or grant, or the equitable title by location and survey. Kimbro v. Hamilton, 28 Tex. 560; Keys v. Mason, 44 Tex. 140; Montgomery v. Gunther, 81 Tex. 325; 16 S.W. 1073; Tarleton v. Kilpatrick, 1 Tex. Civ. App. 107, 21 S.W. 407."

That the State of Texas took title under the Tax Deed is not disputed, and is affirmed by the Ingalls patent of 1863 and the Douthit patent of 1867. It is thus a denial of due process for the Courts below to dismiss this suit on motion for summary judgment on an erroneous interpretation of law, particularly where the facts of non-claim and limitations are in dispute. (See the 1885 opinion, *Heirs of Humphries v. Heirs of English*, No. 682 in the District Court of Jefferson County, Appendix, page 21, as well as the references at 393 F. 2d, page 70, to the history of this litigation.)

II.

The District Court and Court of Appeals both denied your petitioners a hearing on the question of the validity of the Tax Deed of 1850. As pointed out above the Tax Deed must be set aside before any non-claim or limitations title can be acquired by *anyone*.

The alternative to setting aside this Tax Deed would be a declaration that title is now in the State of Texas—and such a declaration would enable the petitioners herein to pursue an alternative claim or cause of action for "preference rights" as discoverers of a vacancy under Article 5421-C, Section 6 of the Texas Civil Statutes. For this reason the summary treatment given this aspect of the case by the Court of Appeals (the first sentence of the second paragraph of the Green opinion) not only denies due process but is a clear refusal to adjudicate a real and substantial question. That this question is properly in the Federal Court appears from a study of 28 U.S.C.A. § 1331, 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1343(3), and the case of *McGuire v. Sadler*, 5th Cir. 1964, 337 F. 2d 902.

CONCLUSION

No attempt has been made here to fully develop the errors committed by the Courts below. A deprivation of property without due process of law, a violation of the Fifth Amendment to the Constitution of the United States, is shown to have occurred and the Courts below should be instructed to hear and act on the questions raised. If a hearing be granted a more complete picture of the tremendous effects of these decisions can be shown this Court—Tennessee and Alabama plaintiffs being summarily denied even a hearing on claims valued in the hundreds of millions of dollars, Court decisions being disregarded, and titles to land being confused rather than clarified.

The importance of these questions is evident from the opinion in the *Humphries* case, 393 F. 2d 69.

Respectfully submitted,

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Appendix